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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051006
Party	Plaintiff Couch/Braunsdorf Affinity, Inc.
Correspondence Address	JOSHUA S FRICK BRINKS HOFER GILSON & LIONE PO BOX 10395 CHICAGO, IL 60610 UNITED STATES officeactions@brinkshofer.com, pjones@brinkshofer.com, jfrick@brinkshofer.com
Submission	Motion to Reopen
Filer's Name	Joshua S. Frick
Filer's e-mail	officeactions@brinkshofer.com
Signature	/Joshua S. Frick/
Date	06/21/2012
Attachments	2012-06-21 - Petitioners REDACTED Motion to Reopen Testimony.pdf (10 pages)(202269 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

COUCH/BRAUNSDORF AFFINITY, INC.,	:		
	:	Cancellation No.	92/051,006
Petitioner,	:		
	:	Mark:	PERKSPOT
v.	:		
	:	Registration No.	3,355,480
12 INTERACTIVE, LLC,	:		
	:	Registered:	December 18, 2007
Registrant.	:		

REDACTED

**MOTION TO REOPEN PETITIONER'S TESTIMONY PERIOD FOR THE LIMITED
PURPOSE OF INTRODUCING NEW EVIDENCE OF ACTUAL CONFUSION**

COUCH/BRAUNSDORF AFFINITY, INC.

Date: June 21, 2012

By: /Philip A. Jones/

Philip A. Jones
Joshua S. Frick
BRINKS HOFER GILSON & LIONE
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(312) 321-4200

Attorneys for Petitioner

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
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**MOTION TO REOPEN PETITIONER’S TESTIMONY PERIOD FOR THE LIMITED
PURPOSE OF INTRODUCING NEW EVIDENCE OF ACTUAL CONFUSION AND
MOTION TO RESET PETITIONER’S TRIAL BRIEF DEADLINE**

Petitioner, Couch/Braunsdorf Affinity, Inc., hereby moves the Board to reopen Petitioner’s testimony period for the limited purpose of allowing Petitioner to introduce new evidence of actual confusion that occurred approximately two weeks ago. The new evidence came into existence after the close of Petitioner’s testimony periods, and after the filing of Petitioner’s and Registrant’s initial trial briefs. Petitioner also moves the Board to reset the deadline to file Petitioner’s Trial Brief as Defendant in Registrant’s Counterclaim.

This new evidence of actual confusion consists of an e-mail string and associated telephone conversation between Petitioner’s president, Robert Dow, and representatives from REDACTED, a merchant for Petitioner. A copy of the e-mail string is attached hereto as Exhibit A. In the e-mail string and associated telephone conversation, REDACTED, confused Petitioner with Registrant.

The e-mail string occurred on May 14 and 15, 2012. Petitioner’s testimony period as plaintiff ended on May 6, 2011, and its testimony period as the counterclaim defendant ended on December 23, 2011. Because this new incident of actual confusion occurred well after the close

of Petitioner's testimony periods, it was not possible for Petitioner to introduce this evidence during its two trial periods.

Petitioner requests the Board reopen Petitioner's testimony period for the limited purpose of allowing Petitioner to take a short deposition for the purpose of authenticating and properly capturing as evidence in this proceeding the details of this new actual confusion incident, and to admit as an exhibit the e-mail string. *Wilderness Group, Inc. v. W. Recreational Vehicles, Inc.*, 222 U.S.P.Q. 1012, 1014 n. 5 (TTAB 1984) (stating a motion to reopen testimony period is proper procedure for introducing evidence that arises after the closing of that period). This new evidence of actual confusion is entitled to substantial weight as it constitutes strong proof of likelihood of confusion, and thus is highly probative of Petitioner's likelihood of confusion claim in this proceeding. *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 853 23 U.S.P.Q.2d 1471, 1475 (Fed. Cir. 1992). The e-mail string demonstrates the actual harm that Petitioner is suffering from Registrant's mark and registration, and that the harm is continuing to the present.

Registrant will not be prejudiced by the limited reopening of Petitioner's testimony period. Registrant will have an opportunity to cross-examine during the short deposition. The actual confusion incident occurred after Registrant filed its initial trial brief, and Registrant will have the opportunity to file one more brief after the conclusion of the limited reopening of Petitioner's testimony period.

Petitioner requests that the Board:

- (1) Order Petitioner's testimony period be reopened for the limited purpose of introducing evidence pertaining to the actual confusion incident set forth in the e-mail string attached as Exhibit A; and

- (2) Reset the deadline for filing Petitioner's Trial Brief as Defendant in Registrant's Counterclaim for thirty (30) days after the close of Petitioner's reopened testimony period; or
- (3) In the alternative, should the Board deny Petitioner's motion to reopen its testimony period, that the Board reset the deadline for filing Petitioner's Trial Brief as Defendant in Registrant's Counterclaim.

Respectfully submitted,

Date: June 4, 2010

By: /Philip A. Jones/

Philip A. Jones
Joshua S. Frick
BRINKS HOFER GILSON & LIONE
P.O. Box 10395
Chicago, Illinois 60610
(312) 321-4200

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **REDACTED**
MOTION TO REOPEN PETITIONER'S TESTIMONY PERIOD FOR THE
LIMITED PURPOSE OF INTRODUCING NEW EVIDENCE OF ACTUAL
CONFUSION was served on opposing counsel by first class mail and e-mail on this 21st
day of June, 2012 addressed as follows:

Michael G. Kelber, Esq.
mkelber@ngelaw.com
Katherine Dennis Nye, Esq.
knye@ngelaw.com
Two North LaSalle Street
Suite 1700
Chicago, Illinois 60602-3801

/Philip A. Jones/

Exhibit A

REDACTED

Subject: FW: PerksCard client-REDACTED

-----Original Message-----

From: REDACTED

Sent: Tuesday, May 15, 2012 1:54 PM

To: Bob Dow

Subject: RE: PerksCard client-REDACTED

Bob,

I apologize. I spoke with REDACTED and he is very embarrassed. He had you all on his mind due to the recent conference call his team had with you. They have had a long term relationship with REDACTED and having to utilize a third party to support that was new for him.

Again I apologize for any confusion. Please let me know if you have any additional issues arise.

Thank you,

REDACTED

-----Original Message-----

From: Bob Dow [mailto:bdow@perkscard.com]

Sent: Tuesday, May 15, 2012 12:33 PM

To: REDACTED

Subject: RE: PerksCard client-REDACTED

Thank you,

There have been cases of confusion with Perkspot which we have had to address and this is just another situation where people assume we are one in the same.

Sincerely,

Bob Dow

President | PerksCard/PerksConnect

11 Oval Drive | Islandia NY 11749

Direct: 631-930-5167 | Cell: 516-456-7766

Fax: 631-941-4636

bdow@perkscard.com

"Many of Life's greatest opportunities come into our lives disguised as problems"

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-----Original Message-----

From: REDACTED

Sent: Tuesday, May 15, 2012 1:29 PM

To: Bob Dow

Subject: RE: PerksCard client REDACTED

We do and he should know the difference. I will touch base.

REDACTED

-----Original Message-----

From: Bob Dow [mailto:bdow@perkscard.com]

Sent: Tuesday, May 15, 2012 12:28 PM

To: REDACTED

Subject: FW: PerksCard client REDACTED

REDACTED

,

I received a call from REDACTED last night from your REDACTED store and he wanted my assistance in with REDACTED who he assumed was one of our clients. As it turns out he thought that Perkspot and PerksCard were the same company.

Does REDACTED also work with Perkspot?

Bob Dow
President | PerksCard/PerksConnect
11 Oval Drive | Islandia NY 11749
Direct: 631-930-5167 | Cell: 516-456-7766
Fax: 631-941-4636
bdow@perkscard.com

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-----Original Message-----

From: Bob Dow
Sent: Tuesday, May 15, 2012 9:12 AM
To: REDACTED
Cc: REDACTED
Subject: RE: PerksCard client REDACTED

Raymond,

You mentioned last night Perkspot and I wonder if you have them confused with PerksCard. The reason I ask is we do not show REDACTED as a PerksCard vendor on our site.

Thanks,

Bob Dow
President | PerksCard/PerksConnect
11 Oval Drive | Islandia NY 11749
Direct: 631-930-5167 | Cell: 516-456-7766
Fax: 631-941-4636
bdow@perkscard.com

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-----Original Message-----

From: REDACTED

Sent: Monday, May 14, 2012 6:20 PM

To: Bob Dow

Subject: Perkscard client REDACTED

Bob, thanks for speaking with me yesterday. I was emailing you about one of our companies (REDACTED,) here in REDACTED who wants us to come onsite for membership drives. They are clients of perkscard. Can you please advise as we want to be able to promote.

Thanks,
REDACTED